4

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Kirsten F. Kelly, Presiding Judge

JOSEPH A. BARNOWSKY
Plaintiff-Appellee,

v

Docket No. 120768

GENERAL MOTORS CORPORATION
Defendant-Appellant.
_____/

REPLY BRIEF ON APPEAL - APPELLANT

Martin L. Critchell (P26310)
Counsel for Defendant-Appellant

1010 First National Building
Detroit, Michigan 48226
(313) 961-8690

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

CASES

MISCELLANEOUS

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT[1]

The Court has jurisdiction to review the opinion which the Court of Appeals entered in *Barnowsky v General Motors Corp*, unpublished opinion of the Court of Appeals, decided on December 21, 2001 (Docket no. 231169), by the authority of the Workers' Disability Compensation Act of 1969, MCL 418.101; MSA 17.237(101), et seq., MCL 418.861a(14), MSA 17.237(861a)(14), second sentence, and the Michigan Court Rules of 1985, MCR 1.101, et seq., MCR 7.301(A)(2). See, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 706, 732; 614 NW2d 607 (2002).

The application for leave to appeal and the filing fee were filed with the Court within twenty-one days after the Court of Appeals entered the opinion in *Barnowsky, supra*.

---

[1] A statement of the basis for the jurisdiction of the Court was not included in the *Brief on Appeal - Appellant* in ignorance of the change to the Michigan Court Rules of 1985, MCR 7.306(A), which was adopted on October 8, 2002, and effective on January 1, 2003. 467 Mich xxxviii.

This statement is the same as that declaration made by plaintiff-appellee Barnowsky in the *Brief on Appeal - Appellee*, Statement of the basis for the jurisdiction of the Court, v.

STATEMENT OF QUESTIONS PRESENTED[2]

I

WHETHER THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 DESCRIBES *REASONABLE* IN MCL 418.315(1); MSA 17.237(315)(1), FIRST SENTENCE, AS *RECOGNIZED BY THE LAWS OF THIS STATE AS LEGAL.*

Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

Board of Magistrates did not answer.

II

WHETHER THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 DESCRIBES *NEEDED* IN MCL 418.315(1); MSA 17.237(315)(1), FIRST SENTENCE, AS *NECESSARY TO CURE AS FAR AS REASONABLY POSSIBLE, AND RELIEVE FROM THE EFFECTS OF THE INJURY.*

Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals did not answer.

Workers' Compensation Appellate Comm did not answer.

Board of Magistrates did not answer.

---

[2] These are the same questions which were propounded in the *Brief on Appeal - Appellant*, Statement of Questions Presented, vi-vii.

III

WHETHER AND, IF SO, WHEN THE DUTY TO PAY MEDICAL EXPENSES FOR A MENTAL DISABILITY AROSE IN THIS CASE.

Plaintiff-appellee Barnowsky answers "Yes" and "From inception."

Defendant-appellant General Motors answers "No."

Court of Appeals answered "Yes" and "From inception."

Workers' Compensation Appellate Comm answered "No."

Board of Magistrates answered "Yes" and "From inception."

IV

WHETHER THE ORDER OF THE WORKERS' COMPENSATION APPELLATE COMMISSION IN *BARNOWSKY v GENERAL MOTORS CORP*, 1999 MICH ACO 2 BARRED THE BOARD OF MAGISTRATES FROM HEARING THE CLAIM THAT THE EMPLOYER PAY THE COSTS OF THE ATTENDANCE OR TREATMENT OF THE MENTAL DISABILITY OF THE EMPLOYEE.

Plaintiff-appellee Barnowsky answers "No."

Defendant-appellant General Motors answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "No."

STATEMENT OF FACTS[3]

The Board of Magistrates (Board) ordered that defendant-appellant General Motors Corporation (Employer) pay plaintiff-appellee Joseph A. Barnowsky (Employee) *compensation at the rate of $397.00 from January 12, 1995*, and *reasonable and necessary treatment of [the] right wrist, subject to cost containment rules*. *Barnowsky v General Motors Corp*, unpublished order of the Board of Magistrates, entered on December 16, 1996 (Docket no. 121696049) (*Barnowsky* I Order) (7a) having the opinion that employment in December, 1994, for $621.88 per week had aggravated a carpal tunnel syndrome in the right wrist and a mental disability that were described in the *Application for mediation or hearing - Form A* (*Prior Application*) (1a). *Barnowsky v General Motors Corp*, unpublished opinion of the Board of Magistrates, entered on December 16, 1996 (Docket no. 121696049), slip op., 3-4 (*Barnowsky* I Opinion). (10a-11a)

On appeal by the Employer, the Workers' Compensation Appellate Commission (Commission) modified the rate of weekly workers' disability compensation that was decreed by the Board in the *Barnowsky* I Order to conform with the facts which were described in the *Barnowsky* I Opinion about the average weekly wage, the tax-filing status, and the dependents of the Employee when injured at work in December, 1994. *Barnowsky v General Motors Corp*, unpublished order of the Workers' Compensation Appellate Commission, entered on January 6, 1999 (Docket no. 97-0034) (*Barnowsky* II Order). (14a) *Barnowsky v General Motors Corp*, 1999 Mich ACO 2, 2, 5 (*Barnowsky* II Opinion). (15a, 17a) The Commission explicitly refused to consider an argument presented by the Employee to modify the *Barnowsky* I Order to include an order that the Employer pay for the costs of the care for the mental disability that was described in the *Barnowsky* I Opinion because the cross-appeal was filed out of time. *Barnowsky* II Opinion, 3, 5. (15a, 17a-18a)

---

[3] These are the same facts which were recited in the *Brief on Appeal - Appellant*, Statement of Facts, 1-3.

After the *Barnowsky* II Order was final with the expiration of the time for filing an application for leave to appeal with the Court of Appeals, the Employee filed another application for mediation or hearing with the Board claiming that the Employer was responsible for the costs of the care that was provided by Dr. Richard Atkins who was a psychiatrist providing regular care after December, 1994 (3a-4a, 5a-6a) and a penalty. *Application for mediation or hearing*, 1, 2. (*Subsequent Application*) (19a, 20a) The Employer appeared and contested this because the medical care for the carpal tunnel syndrome in the right wrist was paid in-full and on-time as required by the *Barnowsky* I Order and the medical care for the mental disability was not allowed by the *Barnowsky* I Order.

The Board amended the order entered in the *Barnowsky* I Order to include *reasonable and necessary treatment of [the] emotional condition subject to cost containment rules* but denied a penalty, *Barnowsky v General Motors Corp*, unpublished order of the Board of Magistrates, entered on March 30, 2000 (Docket no. 033000031) (*Barnowsky* III Order) (21a), having *fully intended to order [this] and had inadvertently neglected to do so* in the *Barnowsky* I Order. *Barnowsky v General Motors Corp*, unpublished opinion of the Board of Magistrates, entered on March 30, 2000 (Docket no. 033000031), slip op., 2 (*Barnowsky* III Opinion). (23a)

The Commission reversed the *Barnowsky* III Order, *Barnowsky v General Motors Corp*, unpublished order of the Workers' Compensation Appellate Commission, entered on November 2, 2000 (Docket no. 00-0183) (*Barnowsky* IV Order) (24a), because the *Barnowsky* I Order was final on the subject of the category of medical care which the Employer must pay having been affirmed in the *Barnowsky* II Order. *Barnowsky v General Motors Corp*, 2000 Mich ACO 2214, 2215 (*Barnowsky* IV Opinion). (26a)

The Court of Appeals granted leave to appeal, *Barnowsky v General Motors Corp*, unpublished order of the Court of Appeals, decided on February 13, 2001

(Docket no. 231169) (27a), and reversed the *Barnowsky* IV Order. *Barnowsky v General Motors Corp*, unpublished opinion of the Court of Appeals, decided on December 21, 2001 (Docket no. 231169) (*Barnowsky* V). (28a)

The Court granted leave to appeal and directed briefing of "(1) how the words 'reasonable' and 'needed' should be construed in MCL 418.315(1); (2) whether and, if so, when the duty to pay medical expenses for a mental disability arose in this case; and (3) whether [the Employee's] claim is barred by res judicata." *Barnowsky v General Motors Corp*, 467 Mich 898; - NW2d - (2002). (36a)

SUMMARY OF ARGUMENT

The grammar, the logic, the authorities, and the argumentation of the Employee in the *Brief on Appeal - Appellee* (*Employee Brief*) are not accurate. An appreciation of these inaccuracies should allow the Court to avoid an imprecise exposition of the language in the statutes of the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., which apply.

ARGUMENT

I

THE EMPLOYEE DISREGARDS THE GRAMMAR AND TEXT OF THE STATUTES IN THE WORKERS' DISABILITY COMPENSATION ACT OF 1969 THAT APPLY

A sentence written in the English language is not the arrangement of words in a line on a page. Rather, a written sentence is recognized and understood only with the device of punctuation. A written sentence can begin only with an upper case letter of the first word which is commonly known as a capital letter. A written sentence can end only with the punctuation marks of a period, an exclamation point, an ellipsis, or a question mark.

Within a written sentence, the meaning of words can be recognized from the boundaries which are marked by other approved devices. These devices include the punctuation marks that are known as the hyphen, the dash, the colon, the semi-colon,

parenthesis, ellipsis, and the comma. Of all of these devices, the comma is the most versatile; the use of a comma does not convey a single meaning to a word or arrangement of words within a sentence.

A comma may be used to replace the conjunction *and* to join a list of nouns or to join two main statements that have some kind of complementary relationship,

John, Robert, Bill, and Joe walked.

The third comma in this example is commonly known as the Oxford comma. An Oxford comma is usually omitted in the United States and inserted to avoid any possible misunderstanding of the intended listing of the nouns,

We enjoyed tea, scones and cakes.
We enjoyed tea, bread and jam, and cakes.

When a comma is used to replace the conjunction *and* to join a list of nouns, it distributes any initial adjective to each of the following nouns,

The red bicycles, tricycles, and scooters were stolen.
means
The red bicycles, red tricycles, and red scooters were stolen.

A comma may be used to provide clarity or avoid any possible ambiguity,

In the valley below, the villages looked small.

The comma establishes that *below* is not a preposition. Without the comma, the sentence might be read to describe the appearance of the *valley* and not the appearance of the *villages*.

A comma must be used after an adverb that begins a sentence which is commonly known as a sentence adverbial,

Obviously, John and Bill walked.

Also, a comma must be used before and after a phrase or word which is parenthetical,

John saw, a moment later, that Bill fell.

Be assured, then, John will help.

Use of a comma in a relative clause depends upon whether the relative clause is restrictive or is non-restrictive. A restrictive relative clause limits or defines the noun or pronoun that is the subject of the sentence which is essential to the meaning of the sentence. A restrictive relative clause does not require a comma,

John *who is walking here* is a person I know.

A non-restrictive relative clause adds another idea which could be expressed in another, subsequent sentence. A non-restrictive relative clause does require offsetting commas,

The Bible, *which has been transcribed again*, remains a best seller.

A comma is not at all proper between an adjective and noun,

The red bicycle was stolen.

and is usually omitted when *and*, *but*, or *or* join two or more adjectives,

John took a *hesitant and short* step forward.

See *Hart's Rules for Compositors and Readers at the University Press*, 39th edn (Oxford University Press, 1983). (*Hart's Rules*). Burchfield, R.W., *The New Fowler's Modern English Usage* (*Rev Edn*) (Clarendon Press, Oxford, 1998). (*Fowler's*).

A. THE PUNCTUATION OF *REASONABLE MEDICAL, SURGICAL, AND HOSPITAL SERVICES AND MEDICINES, OR OTHER ATTENDANCE OR TREATMENT* DISTRIBUTES THE ADJECTIVE *REASONABLE* THROUGH THE LIST OF ABSTRACT NOUNS *MEDICAL, SURGICAL, AND HOSPITAL SERVICES AND MEDICINES* WHICH ARE SPECIFIC KINDS OF *ATTENDANCE OR TREATMENT*

The diverse uses of the comma are found in the statute in the WDCA that applies to this case. MCL 418.315(1); MSA 17.237(315)(1). Section 315(1), first sentence, states that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed."

The phrase *or cause to be furnished* is plainly parenthetical to the antecedent phrase *The employer shall furnish* and so, it is offset by a comma at the beginning and end. *Hart's Rules*. *Kales v City of Oak Park*, 315 Mich 266, 271; 23 NW2d 658 (1946). *Winokur v Michigan State Bd of Dentistry*, 366 Mich 261, 266; 114 NW2d 233 (1962).

The phrase *to an employee who receives a personal injury arising out of and in the course of employment* is a non-restrictive relative clause by adding another idea to the sentence which could be expressed by another subsequent sentence and so, it is offset by a comma at the beginning and at the end.

Commas are also used to list three particular abstract nouns, *medical, surgical, and hospital services*. The use of the commas here replaces the conjunction *and* for the purpose of economy of the language. The statute could be written without commas as *medical and surgical and hospital services*.

The comma after *surgical* is the Oxford comma and used as the prevailing style when section 315(1), first sentence, was first enacted and continued as a grammatically proper use even if not the contemporary style. *Hart's Rules. Fowler's.*

The use of these commas distribute or refer the adjective *reasonable* to each of the listed nouns. *Hart's Rules. Fowler's.* Replacing the comma with the conjunction *and* renders the phrase as *reasonable medical services and reasonable surgical services and reasonable hospital services.*

This is the same use of commas in a statute which was recognized by the Court of Appeals in the case of *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997) that the Employee cited in the *Employee's Brief*, Argument IA, 10. In the case of *Dale, supra*, 61, 69, the Court of Appeals quoted the statute and recognized the listing of three related, abstract nouns which were *dangers* that was achieved by the use of commas,

> "[e]ach person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries that result from collisions with other roller skaters or other spectators, injuries that result from falls and injuries which involve objects or artificial structures properly within the intended travel of the roller skater which are not otherwise attributable to the operator's breach of his or her common law duties. [MCL 445.1725; MSA 18.485(5).]
>
> * * *
>
> The second sentence further defines (by way of example and not limitation) three types of dangers that are 'obvious and necessary.' These examples are separated by commas. Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent. The punctuation in § 5 suggests that the three examples are independent of and do not modify each other."

Dale, supra, is accurate and establishes that the listed abstract nouns do not modify each other. The three kinds of *dangers* in that statute are distinct just as the three kinds of *services* in section 315(1), first sentence, are distinct and do not modify each other. However, the exposition by the Court of Appeals in the case of *Dale, supra*, goes no further.

It cannot extend to this case because the statute there did not list another noun as section 315(1), first sentence. Section 315(1), first sentence, includes another different noun which is *medicines* that is not offset with a comma. Moreover, the statute in *Dale, supra,* did not describe a list of specific nouns followed by a generic phrase by using the phrase *or other* as section 315(1), first sentence, does.

The Employee misapprehends the use of the comma which offsets the phrase *or other attendance or treatment recognized by the laws of this state as legal* as a non-restrictive relative clause because of the presence of a comma at the beginning and end. It is not a non-restrictive relative clause because the second comma is not an offsetting comma but instead is used to replace the conjunction *and* to join two main ideas which have a complementary relationship. The main ideas are what kinds of attendance is available which is first expressed as *reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal* and the distinct but complementary idea about when that is available and expressed by the next phrase *when they are needed.* This can be best appreciated from replacing the comma with the conjunction *and* so the statute reads . . . *or other attendance or treatment recognized by the laws of this state as legal* ***and*** *when they are needed.*

This can also be appreciated from the text of section 315(1), first sentence. The phrase *or other* is disjunctive and allows transversing the order of the specific list and the generic term to read *attendance or treatment recognized by the laws of this state as legal or other reasonable medical, surgical, hospital services and medicines* and is exactly the text which allows the two clauses to be considered together and obviates the last antecedent rule which the Employee advances in the *Employee Brief,* Argument IA, 12.

This precludes resorting to the dictionary which the Employee advances in the *Employee Brief,* Argument IA, 7. *People v Smith,* 246 Mich 393; 224 NW 402 (1929). *W S Butterfield Theatres, Inc v Dept of Revenue,* 353 Mich 345; 91 NW2d 269 (1958).

Robertson v DaimlerChrysler Corp, 465 Mich 732; 641 NW2d 567 (2002). *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). In the case of *Robertson, supra*, 748, the Court expressly observed that, "*[u]nless defined in the statute*, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also, *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997)." (emphasis supplied)

Most recently, the Court again said in the case of *Stanton, supra*, 617, "because the motor vehicle exception does *not* provide a definition of 'motor vehicle,' we are required to give the term its plain and ordinary meaning. MCL 8.3a; *People v McIntyre*, 461 Mich 147, 153; 599 NW2d 102 (1999)." (emphasis supplied)

B. EJUSDEM GENERIS APPLIES BECAUSE OF THE TEXT *OR OTHER* AND EFFECTUATES ALL OF THE TEXT OF SECTION 315(1), FIRST SENTENCE

The conjunction *or other* in section 315(1), first sentence, readily signals that *attendance or treatment recognized by the laws of this state as legal* is defined in part by the list of particular examples *reasonable medical, surgical, and hospital services and medicines*. This has two consequences for any exposition of section 315(1), first sentence. One, the list of the particular items *reasonable medical, surgical, and hospital services and medicines* are themselves particular kinds of *attendance or treatment recognized by the laws of this state as legal*. The Court cannot delete any one of the particular items that are listed. The other consequence is that the use of the conjunction *or other* allows the Court to add other particular items to this list by reference to the quiddity of the particular items which are listed as *reasonable medical, surgical, and hospital services and medicines*. This process of exposition is a variant of noscitur a sociis which is commonly known as ejusdem generis and was recently applied by the Court in just this way in the case of *Weakland v Toledo Eng Co, Inc*, 467 Mich - ; - NW2d - (Docket 119495, rel'd February 4, 2003).

In the case of *Weakland, supra*, slip op., 5-6, the Court recognized that ejusdem generis was engaged by the text *or other* in section 315(1), eighth sentence, to determine whether another kind of device, a van, was or was not included in the term *appliances* as were the listed devices,

> "[t]his Court has utilized this canon [ejusdem generis] frequently in defining the scope of a broad term following a series of specific items. In discussing this canon in *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001), we described how meaning is given to the general term in that situation as follows: '[T]he general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated'; that is, because the listed items have a commonality, the general term is taken as sharing it.
>
> As Judge Young pointed out, the statutorily listed items, 'dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus' share a commonality in that they are artificial adaptive aids that serve to directly ameliorate the effects of the medical condition. A van is dissimilar to the listed items."

As the Employer previously pointed out, the problem here does not involve adding to the list as in the case of *Weakland, supra*, but only recognizing that the specific listed nouns are within the general term and cannot be excluded. This means **reasonable** *medical services* is a species or an example of *treatment* **recognized by the laws of this state as legal.**

The Employee disregards the principle of ejusdem generis and so, its consequences.

Of course, the Legislature may add to the list by amendment just as it has. Section 315(1), second and third sentences.

C. THE SYLLOGISM OF THE EMPLOYER IS CORRECT

In formal logic, the term *distribution* is used to signify the full extension of a term to apply to all of the objects thought to be within a particular group or class. For example, in the phrase *All men are created equal*, the term *men* is *distributed* as *all* designates the total number of the individuals in the group. In the phrase *Some men are*

created equal, the term *men* is *not* completely distributed as *some* describes something less than the total membership of the group of *men*. In the phrase *No men are created equal*, the term *men* is *not distributed* as the two groups are independent having no shared members.

To decide the validity of any proposition through formal logic, it is necessary to learn the syllogism which applies. The simplest formula for this is that the predicate for all affirmative statements are *distributed* while the predicate for all negative statements are *undistributed*. This can be seen by the following charts,

Affirmative Statement

All men are created equal

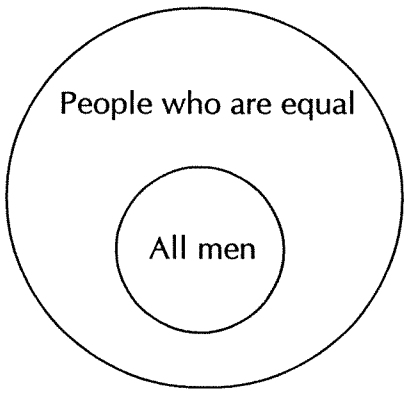

figure no. 1

Negative Statement

No men are created equal

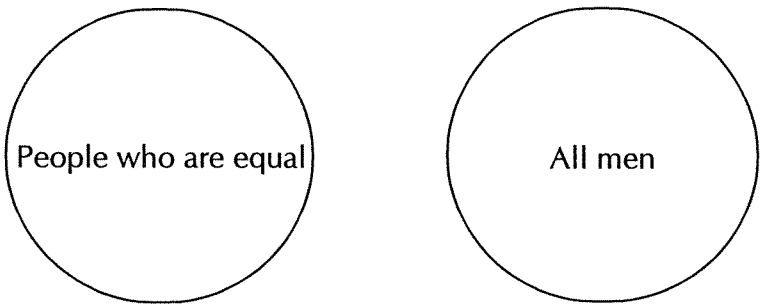

figure no. 2

The corollary is the distribution for a partial affirmative statement is partially distributed and a partial negative statement is partially distributed. This can be seen from the following charts,

Partial Affirmative Statement

Some men are created equal

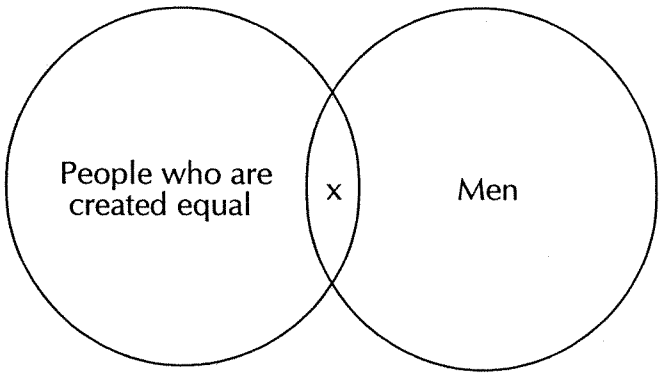

figure no. 3

Partial Negative Statement

Some men are not created equal

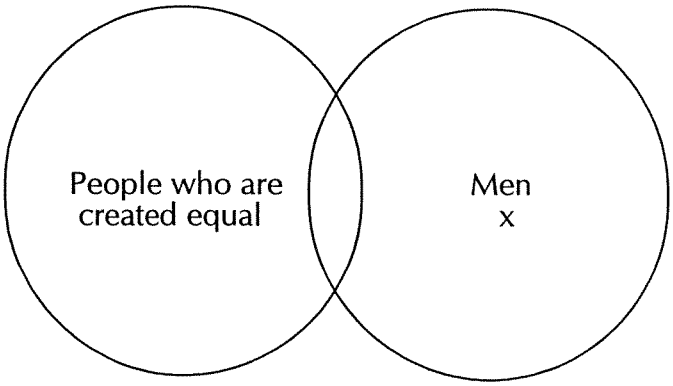

figure no. 4

In figure no. 3, the part of the circle of men which is checkmarked overlaps the circle of the people who are created equal which reveals that neither the subject or the predicate are distributed. Neither group is the entire class which is involved. In figure no. 4, part of the circle of men which is checkmarked is beyond the circle of the people who are created equal which reveals that the subject of men is not distributed but the predicate term of people who are created equal is because the subject is completely beyond the *entire* group of people who are created equal.

Here, the subject is *reasonable medical, surgical, and hospital services and medicines* and the predicate is *attendance or treatment recognized by the laws of this state as legal* because the subject is specific and the predicate general. Consistent with this text and the rule of ejusdem generis, formal logic suggests *complete distribution* which can be seen as,

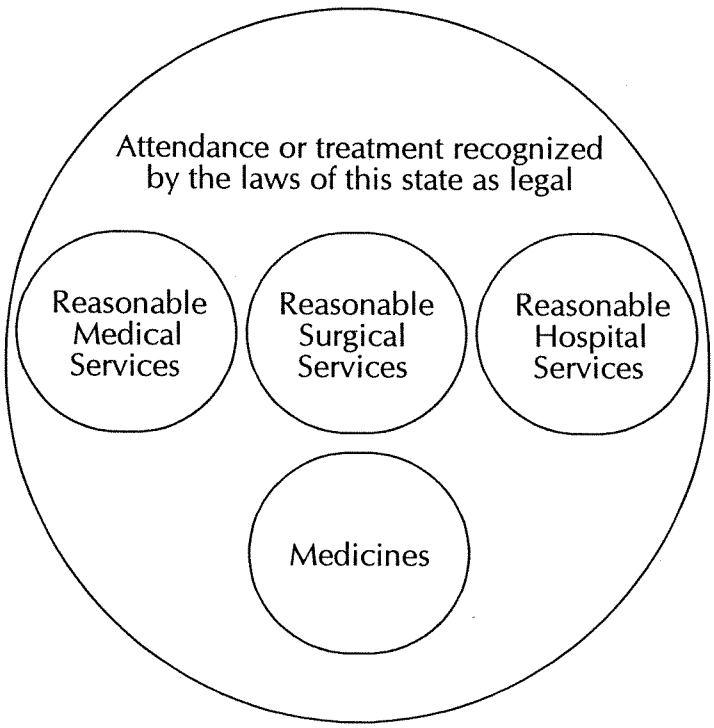

figure no. 5

This is the syllogism which was presented by the Employer in the *Brief on Appeal - Appellant*, Argument I, 13. The Court must recognize and cannot exclude any of the explicitly listed subjects but can add to this list. This is the requirement of ejusdem generis. *Weakland, supra.*

The syllogism presented by the Employee is profoundly different by treating the subject and predicate as undistributed because they are thought to be independent. The Employee says the subject of *reasonable medical services* is beyond *attendance or treatment recognized by the laws of this state as legal. Employee Brief*, Argument IA, 11, "[t]he phrase 'or other attendance or treatment recognized by the laws of this state as legal,' set off as it is by a comma, is independent of what came before. The modifying clause 'recognized by the laws of this state as legal' refers solely to the last antecedent, that being 'other attendance or treatment.'" This independence may be seen as,

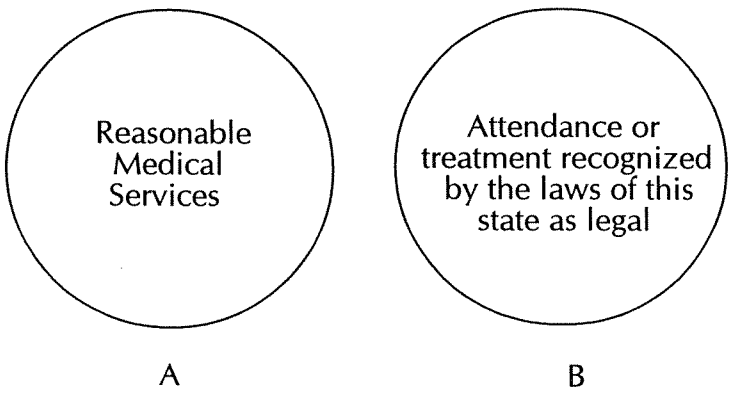

figure no. 6

The syllogism which results from excluding the subject of *reasonable medical services* from the predicate *treatment recognized by the laws of this state as legal* is not readily suggested by the punctuation or text. Also, the syllogism has odd consequences. For example, different people decide the items which are within figure 6A and figure 6B. In the view of the Employee, someone other than the Legislature decides what is (or is not) a

reasonable medical service such as a doctor, the employee, the Board, or the Commission while only the Legislature decides what is (or is not) *attendance or treatment recognized by the laws of this state as legal.*

Also, by placing the subject of *reasonable medical . . . services and medicines* beyond the predicate of *attendance . . . recognized by the laws of this state as legal,* the Employee would allow an injured employee access to illegal medicine such as marijuana or Thalidomide which could be legal elsewhere or peach pit treatment for cancer which could be legal elsewhere. It would allow an injured employee treatment by an unqualified person such as a de-licensed physician, a veterinarian, or so-called faith healer.

The case law cited by the Employee cannot apply having never considered this problem. Indeed, the Court excluded this when deciding the case of *Kushay v Sexton Dairy Co,* 394 Mich 69; 228 NW2d 205 (1975).

D. THE EMPLOYEE CONFLATES *REASONABLE* AND *NEEDED*

The Employee implies that *reasonable* concerns the *medical, surgical, and hospital services* which are available in a particular case. *Employee Brief,* Argument IA, 8. There, the Employee states that,

> ". . . treatment would be appropriate if it addressed the injury sustained and offered a reasonable prospect of relief from that injury. For example, if a claimant suffered a heart attack, open heart surgery or a bypass might be reasonable treatment, but a heart transplant would likely not be. This would probably be too extreme. In a slightly different vein, an injured employee might be assisted by a few weeks of chiropractic manipulation. Extending that treatment for a year or two, without any significant change in the claimant's condition or pain levels, might be considered excessive.
>
> Furthermore, the cost of a treatment, relative to the amount of relief achieved, might also become an issue. A new and untested therapy which was uncommonly expensive, but which offered only a five percent chance of success, might be deemed unreasonable. However, the same procedure with a 95 percent chance of success probably would be."

This conflates *reasonable* and *needed.* Open heart surgery and a heart transplant are both *reasonable . . . surgical . . . services* when performed by licensed physicians because both are *recognized by the laws of this state as legal.* Whether one or the other of these reasonable or legal procedures should be performed on a particular employee depends on which one is *needed* to address the particular situation. Similarly, treatment "without any significant change in the [employee's] condition or pain" is properly ended because it is not *needed* and not because it became *unreasonable.*

One of the examples provided by the Employee belies the whole construct. The Employee proposes an example of chiropractic manipulation. *Employee Brief,* Argument IA, 8. Chiropractic manipulation is a kind of treatment which can be available to an employee after a personal injury at work only because it is within the rubric of *attendance or treatment recognized by the laws of this state as legal* as The Public Health Code recognizes chiropractic as a kind of a treatment which is legal in Michigan. MCL 333.16401(1); MSA 14.15 (16401)(1). Chiropractic is not a *reasonable medical . . . service.* See *Attorney General v Beno,* 422 Mich 293; 373 NW2d 544 (1985). Whether chiropractic should start and how long it should continue in a given case depends on the *need* of that particular employee.

Cost is not an element of section 315(1), first sentence. Cost of care is managed by a panoply of administrative rules promulgated by another, allied statute in the WDCA. MCL 418.315(2); MSA 17.237(315)(2).

The case of *Bower v Whitehall Leather Co,* 412 Mich 172; 312 NW2d 640 (1981) which the Employee relies on, *Employee Brief,* Argument IA, 7, cannot apply. In the case of *Bower, supra,* the Court did not consider section 315(1). Indeed, the Court did not consider any statute in the WDCA. The subject of *Bower, supra,* was the role of reasonableness in *favored work* which the Court recognized was a judicial rule, not a legislative statement, by stating that, "[t]he favored-work doctrine is a purely judicial

creation." *Bower, supra*, 182. *Bower, supra*, was replaced by legislation which has been in effect since 1982. See *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000),

> ". . . the *Russell* decision does not interpret or apply the underlying statute. MCL 418.301(5); MSA 17.237(301)(5). Instead, it relies on principles established by case law predating the Legislature's codification of the judicially created favored work doctrine. The Legislature worked a subsequent change or development in the law when it codified the favored work doctrine as the reasonable employment doctrine. See 1981 PA 200; 1981 PA 199.
>
> * * *
>
> . . . case law must accurately reflect the legislative enactment on which it is based . . ."

E. A *PERSONAL INJURY* ONLY ESTABLISHES THE ELIGIBILITY OF AN EMPLOYEE FOR *ATTENDANCE OR TREATMENT*

An employee is eligible for the various benefits which are available from an employer by the terms of the WDCA when experiencing a *personal injury arising out of and in the course of employment.* MCL 418.301(1); MSA 17.237(301)(1). Section 301(1), first sentence, states that, "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury shall be paid compensation as provided in this act."

Section 315(1), first sentence, repeats this requirement of a *personal injury arising out of* . . . by stating that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives *a personal injury arising out of and in the course of employment*, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed." (emphasis supplied)

It is this text which disallows an employee preventative medical attendance such as an annual physical examination; a vision, hearing or blood pressure test; or, an electrocardiogram or chest x-ray. Preventative medical attendance occurs before any

personal injury. It is this text which disallows an employee forensic medical attendance such as a physical examination and tests by a physician to determine if a *personal injury* had actually occurred. It is this text which disallows an employee palliative treatment for an existing condition such as an aspirin for headache; a lozenge for a sore throat; or, liniment for a back ache. The symptoms of an existing condition are no *personal injury*. *Marman v Detroit Edison Co*, 268 Mich 166; 255 NW 750 (1934). *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982). *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993). *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57; 523 NW2d 444 (1994), reh den 447 Mich 1202; 525 NW2d 453 (1994).

While a prerequisite, a *personal injury* alone is not enough. Eligibility of an employee is not obligation of an employer. An employee still must notify the employer of the *personal injury* and must also claim that some *attendance or treatment* is *needed*. MCL 418.381(1); MSA 17.237(381)(1). Section 381(1), first and third sentences, state that,

> "[a] proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for injury, which claim may be either oral or in writing, has been to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury. The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury."

The sense of section 381(1), first and third sentences, is obvious. No employer can even begin to recognize and fulfill a duty without actually knowing about the harm and the need for redress which made the employee eligible.

A duty cannot arise with the occurrence of a *personal injury* because there is no mechanism in the WDCA which allows an employer to unilaterally fulfill that obligation. An employer cannot force any *attendance or treatment* on an injured employee to fulfill a duty when the injured employee does not want what the employer thinks is *needed*.

Blackwell v Citizens Ins Co of America, 457 Mich 662; 579 NW2d 889 (1998). Strictly speaking, a duty cannot exist when it cannot be fulfilled because of the actions of another person are required. This problem does not occur when there is an order by the Board because then and only then is there a *personal injury* required by section 301(1), first sentence, and section 315(1), first sentence; actual *notice* of the injury which is required by section 381(1), first sentence; a want for attendance or treatment by the injured employee required by section 381(1), third sentence; and finally, a detailed description of the responsibility in a written order of the Board or Commission. MCL 418.847(2); MSA17.237(847)(2), first sentence. MCL 418.861a(10); MSA 17.237(861a)(10).

F. AN OPINION OF THE BOARD OF MAGISTRATES OR THE WORKERS' COMPENSATION APPELLATE COMMISSION DOES NOT ESTABLISH THE RIGHTS OR DUTIES OF AN EMPLOYEE OR EMPLOYER

A court adjudicates only by written order. *Heck v Bailey*, 204 Mich 54, 57; 169 NW 940 (1918). *Harnow v Haight*, 212 Mich 66, 69; 179 NW 473 (1920). *Miskinis v Bement*, 325 Mich 404, 405; 38 NW2d 897 (1949). *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). *People v Hampton*, 407 Mich 354, 374, n 1; 285 NW2d 284 (1979) (LEVIN, J., concurring). The Court held in the case of *Tiedman, supra*, 576, that, "[t]he rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions."

This principle applies to the cases which are presented to the Board and Commission even though neither is a *court*. *Solakis v Roberts*, 395 Mich 13, 20-21; 233 NW2d 1 (1975). The reason that this principle applies is the WDCA explicitly requires the Board and the Commission to resolve every contested claim for workers' disability compensation with a written order which must be explained by a separate, written opinion. MCL 418.851; MSA 17.237(851). Section 847(2), first sentence. Section 861a(10), (14). For example, section 851, third sentence, requires the Board to enter an order to resolve a controversy by stating that, "[t]he hearing shall be held at the locality where the injury

occurred and the order of the [Board] shall be filed with the bureau [of workers' and unemployment compensation]" while section 847(2), first sentence, requires a separate, written opinion by stating that, ". . . the [Board], in addition to a written order, shall file a concise written opinion stating [the] reasons for the order including any findings of fact and conclusions of law."

The reason for requiring both a written order and a separate written opinion is to preserve the separation of powers. See, *Nunn v George A. Cantrick Co, Inc*, 113 Mich App 486; 317 NW2d 331 (1982). In the case of *Nunn, supra*, 493, the Court of Appeals per Judge Cavanagh, now Justice, said,

> ". . . constitutional government cannot tolerate arbitrary or capricious official acts or decisions, and once government by *fiat* or *ukase* is philosophically rejected, the necessity of reasoned explication of the motives, purposes, and facts behind governmental adjudicatory action logically flows as a concomitant of the republican form of government guaranteed by the United States Constitution. US Const, art IV, § 4.
>
> In the case at bar, the challenged statute explicitly demands the rendition of findings of fact and conclusions of law in writing, leaving to the board the option of issuing a written opinion or not. Assuming, as we must to effectuate the legislative intent, more than a semantic difference between a 'written opinion giving reasons' for the decision rendered and written 'findings of fact accompanied by a concise and explicit statement of the underlying facts supporting them' and conclusions of law 'supported by authority or reasoned opinion', we construe the statute as perpetuating the obligation of the board to provide the parties and reviewing courts with sufficiently detailed findings of fact and conclusions of law . . ."

The order controls and cannot be changed by the written opinion. *Tiedman, supra*. *Kadri v Ford Motor Co*, 134 Mich App 138; 350 NW2d 763 (1984). In the case of *Kadri, supra*, 140-141, the Court of Appeals explained exactly what writing was the order and what writing was the opinion and how the rule applied in the case of a claim of a conflict,

> "[t]he question to be resolved is just what constituted the 'order' of the hearing officer. Plaintiff contends that the green sheet plus the two-page addendum must be read together. However,

> a careful review of the hearing officer's decision compels the conclusion that his order was contained on the green sheet, in the sections specifically set aside for the announcement of his order. The green sheet provides separate sections for announcing open and closed awards; the hearing officer utilized § 1, and thus his intent to render a closed award cannot reasonably be disputed. The addendum, on the other hand, can accurately be described as the hearing officer's opinion, in that it contains his thoughts and doubts about the case. The hearing officer indicates the evidence which he relied upon when making his findings of fact and how he resolved issues such as the credibility of the witness. An order typically contains conclusions; an opinion describes how and why the writer came to such conclusions. Thus, it is clear that the addendum is merely an opinion written by the hearing officer which was in no way intended to modify the clear and unambiguous order, contained on the green sheet, of a closed award.
>
> Since the two-page addendum was the hearing officer's opinion, and not a part of the order, anything stated in the opinion which tends to contradict the order should have been ignored. 'A court speaks by its orders, not its opinions.'"

The Employee ignores this in favor of one decision by the Commission which expresses a "common sense" rule. *Brief on Appeal - Appellee*, Argument III, 27.

The case law of *Dean v Great Lakes Casting Co*, 78 Mich App 664; 261 NW2d 34 (1978) and *Viele v DCMA*, 167 Mich App 571; 423 NW2d 270 (1988), lv den 431 Mich 898; 432 NW2d 171 (1988) that allow for a rehearing of orders that were not final orders in no way apply. First, the decisions were rendered before the enactment of the statutes which now apply to describe when rehearing may be sought and the terms or scope of rehearing by the Board and Commission. Section 851, fourth sentence, and MCL 418.861a(15); MSA 17.237(861a)(15), first sentence, apply now to describe when and how rehearing can be secured. The Employee pursued neither.

Second, the case law of *Dean, supra*, and *Viele, supra*, allowed rehearing by the court which entered the order. *Dean, supra*, and *Viele, supra*, did not allow rehearing after an appeal was filed and the order modified by the reviewing court. *This* is what the Employee sought. The Employee made a claim only after the Employer had filed the claim for review with the Commission to appeal the *Barnowsky* I Order; after the Commission had

entered the order modifying the *Barnowsky* I Order, *Barnowsky* II Order; and after the *Barnowsky* II Order was final.

RELIEF

Wherefore, defendant-appellant General Motors Corporation prays that the Court reverse the opinion of the Court of Appeals.

Martin L. Critchell (P26310)
Counsel for Defendant-Appellant

1010 First National Building
Detroit, Michigan 48226
(313) 961-8690